THE CENTRAL LAW JOURNAL

Hon. JOHN F. DILLON, Editor.
S. D. THOMPSON, Ass't Editor.
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In the case of Darias Rogers, published in our last issue, the case was entitled as of the "Eastern District of Kansas." It should have been simply "District of Kansas." The state of Kansas constitutes but one federal district.

INSANITY AS AN EXCUSE FOR CRIME.—The Daily Register, in reviewing the 7th Edition Dr. Wharton's work on Criminal Law, makes the following observations:

To our non-professional readers, the most interesting and profitable portion of the work will doubtless be the volume devoted to "Principles;" and in this connection the well known advice which Blackstone, in his "Commentaries," gives to the gentlemen of England, would well be applicable here. To the "lay gents"—such being the recognized law term in use for hundreds of years to signify the uninitiated—that part of the volume treating of the question of insanity, and the consequent testimony of "experts," will address itself. When we read in trial after trial, no matter what the offense, no matter what the defense, insanity is in some way thrust in, followed by testimony—always conflicting—of experts, we are often tempted to wonder if, after all, "the law is the perfection of reason." Yet it may be said of this, as in so many other instances where law seems one thing and justice another, that the difficulty is not with the law, but in its application. The course now followed in mixing up the issue of insanity with the other questions in the case to be passed upon by the same jury, at the same time by the same verdict, though sanctioned by time honored custom, is attacked from all quarters with loud complaints. Many schemes have been proposed. The Albany Law Journal, an able and leading law periodical, always alive to the issues of the day, in recent numbers has suggestions that a portion of the jury be composed of medical men, that one or two doctors sit at a trial as *quasi* judges, who shall charge the jury on questions of insanity in like manner as the judge charges them upon questions of law; that the question of insanity shall be left wholly to a few doctors, whose decision shall be final.

In the Ohio Legislature a bill was recently pending, if it has not already been disposed of, which provides that in cases where the defendant expects to plead insanity, he must give notice thereof beforehand; an issue upon that point alone is then to be made up, and the fact of insane or not to be tried and decided by a special jury in advance of his trial upon the indictment. Whether or not any of these schemes would materially advance the interests of justice, time only would prove; but that some change is needed is evident. We might add that perhaps the root of the evil lays deeper than the mere application of the law. Is it certain that insanity should be a defense against punishment for acts which are admitted would be criminal in a sane person? If the laws of society stand only upon the foundation of mutual protection — and with the immorality of crime human laws have nothing to do —should not society be protected? This question, however, opens up a discussion much too important for the limited space of a book notice. Dr. Wharton's work treats of the law as it is, not of changes which might be introduced.

Judicial Dignity.

Some of our foreign legal exchanges seem to have enjoyed very much a picture of a criminal trial in one of the courts of common pleas of Ohio, drawn by a correspondent of our excellent contemporary, the Canada Law Journal. We confess that this correspondent holds the mirror up to nature so closely that we cannot doubt that his statements are, in the main, truthful; but our knowledge of the people of Ohio, of their wealth and culture, induces the suspicion that his lively imagination, may have drawn him unconsciously into the fault of adding a few extra touches, just to enhance the *tout ensemble*, you know. However this may be, since the Tichborne trial, we feel reconciled to almost anything our Canadian and British brethren may say of our courts and judges. The gowns and the wigs may have given that great trial an appearance of dignity, but it was at many times the shadow without the substance. Let him who is fond of comparisons imagine (if he can) the Chief Justice of the United States, with one of his associates on either hand, bandying words with an advocate, as the Lord Chief Justice of England bandied words with Dr. KENEALY. When we consider how our Canadian and British friends must have enjoyed themselves in reading this pen-picture of the Ohio court, we derive additional consolation from the thought that the entire bar of Montreal felt obliged during four months of the past winter to withdraw from practice before the highest court of that province. We also derive a few crumbs of comfort from the following picture, which we find in the Irish Law Times, of the dignified behavior of an English county judge, whose jurisdiction appears to resemble, in some respects, that of the judges of the common pleas of Ohio:

County court judges in England sometimes curiously forget their position, as will appear by the following extraordinary scene which occurred at the petty sessions lately held at Rhyl, and arose out of a charge of assault, preferred by a hackney car-driver named Powell, against Mr. Robert Vaughan Williams, who holds the appointment of county court judge of the district, which includes Chester and most of the towns of North Wales. It appeared that on Friday last the complainant was driving a vehicle which came into collison with the defendant's carriage in one of the streets of Rhyl. Defendant then struck Powell with his whip, and this was the assault complained of. When the case was called on, the defendant rose, and delivered an angry address, which he concluded by ordering the plaintiff into custody for a period of seven days. This seemed rather too much for the magistrate who presided, and the chairman (Mr. Dixon) said the case must be taken in the ordinary way. In the meantime, a solicitor made an observation which still further aggravated the county court judge, who forthwith threatened him with seven days' incarceration. Nevertheless, the case was proceeded with, and the upshot was that the bench ordered the judge to pay a fine of £5, which his honor indignantly declined to do, whereupon the bench gave him the alternative of fourteen days' imprisonment. This terrible punishment was, however, averted by the kind offices of a friend, who paid the fine.

But to return to the letter of the Canada correspondent. After describing the court-room and the jurors, he says:

This case (it was the trial of a citizen for burglary) had been going on all day before; counsel had already "made augument" three different times; the prisoner's counsel was just winding up an address, the magnitude of which was obvious from the pile of manuscript in which it was transcribed, and to which constant reference was made, and it was stated that the state prosecutor and judge would follow at proportionate length. The long suffering of the jurors was, however, made intelligible when we were told they were professionals—in other words, that they made a business of serving on juries, and thereby earned a competent livelihood. It was also darkly hinted that a suitor had facilities for retaining a jury, as well as a counsel—and a judge. There was a judicial bench in the court of common pleas, but at present it was unoccupied. An elderly gentleman was sitting on a cane-bottomed chair, facing the wrong way, and warming his back at the open fire. His chin was resting on the chair-back, and he was meditating profoundly. He occasionally rose, traversed the room, his hands in his pockets, and expectorated thoughtfully. This was the judge. The prisoner sat by his counsel at a small table in front of the jury. We looked in vain for a dock. They have more delicacy about those matters in the states. There was another gentleman at this counsel's table, who attracted observation. His chair was tilted back against a pillar; his feet rested on the back of another chair before him. He was so placed that the judge was seated directly opposite him, and was forced to contemplate the soles of his boots. This gentleman was dressed in the seediest apparel; he picked his teeth with a pen-knife; he expectorated continuously; he was lean and sallow.

We thought he might be a crier of the court, or a personal friend of the burglar. What was our surprise when, on the defendant's counsel drawing his tedious oration to a close, he lowered his feet from their elevation, brought his chair to the horizontal, and rose with the obvious intention of haranguing the

jury. He was, in truth, the state prosecutor. He first took from the table a dirk, which, with other murderous articles, had been found upon the prisoner. He examined it deliberately, felt its edge, held it up for the jury to observe, and commenced his address with the calmness and self-possession of the practical speaker. The opening of his speech was almost word for word as follows:—"You have heard tell, gentlemen of the jury, of the Gordian knot. Alexander, gentlemen, Alexander the Great, wanted to untie that Gordian knot, but he could not do it, nohow. So what did he do? He just whipped out his sword and cut that knot right square through. Now, gentlemen, we have a Gordian knot to untie, and a tough one, too. But I won't trouble you to untie it. I'll just slither it right clean through with this dagger. You have likely seen instruments of this sort before. They are only found on two classes of men—Texan Rangers and Italians; and when you find one of these on a man, you know he's a *rascal and a scoundrel, like this fellow here.*"

At this juncture, the learned correspondent was seized with a disposition to mirth, which, he says, attracted the attention of the usher of the court, who was "eating an apple with a pocket-knife, which had evidently cut a good deal of tobacco," and he thought it well to retire before he had compromised his character by laughing in the face of justice.

The Emperor JULIAN, was, we must allow (although we cannot agree with him in his religious views), a judge of no mean pretentions. He frequently presided in the Forum of Constantinople, clad in his imperial garments; and his clear and penetrating intellect constantly detected and exposed the shams and the subtleties of the advocates. But his indignation against the pettifogger frequently overcame his dignity, and for this fault, he often suffered himself to be reproved by his ministers. But, great as he was as a judge, as a warrior, as a statesman, and as the supreme pontiff of the Immortal Gods, to say nothing of his skill as an orator and his wisdom as a philosopher, we are pained to say that he was not ashamed to boast that his hands were never washed, and that his beard was unkempt and *populous*. We have judges of high courts in the United States who expectorate tobacco juice from the judgment seat, and who write two-bottle and three-bottle opinions that would not have disgraced my Lord ELDON. We sincerely wish, for the sake of history, that Judge JULIAN could have been induced to wash his hands and comb his beard; and we sincerely wish that all American judges would refrain from the use of tobacco while on the bench, and from the use of ardent spirits at all times. We also hope that all judges will digest their dinner and "sleep well o' nights," to the end that they may be able to treat the members of the bar, and particularly the younger members thereof, with that indulgence which is due to the dignity of the court and to the infirmity of the advocate. In short, we desire to record our vote in favor of judicial dignity.

The Louisiana Question.

Since going to press with our last issue, the acting government of the state of Louisiana has been overthrown by an armed insurrection, and re-instated by the President of the United States. With the exception of the Arkansas case, this is the first time in our history when it has been sought to overturn a *de facto* state government on the Spanish-American plan. So anamolous is the case, and so strong are the political feelings entering into it, that in attempting to discuss it, men are apt to lose their heads. On the one hand the spectacle of an established state government being overthrown in a few hours by an insurrection rising up in the streets of the state capital, is calculated to produce a profound feeling of alarm in the breast of every friend of republican institutions. On the other hand, it is not for Americans to deny a prniciple which is incorporated into many of our state constitutions, that the doctrine of non-resistance to arbitrary power is a slavish doctrine, unworthy of a free people, and that, whatever the form of government or condition of society, the right of revolution always remains, subject to be called into exercise by grievances which have become intolerable and which can be redressed in no other mode.

It is not our purpose to discuss any political question involved in the Louisiana troubles. The province of a law journal is to eschew politics and to address itself to legal questions alone. We therefore remain silent on what may be termed the *merits* of the case. We neither condemn nor defend the recent insurrection in the streets of New Orleans; but we propose to direct attention to the simple point of the *legality* of the President's action in the premises.

The constitution of the United States (Art. 4, § 4) provides that "the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened) *against domestic violence.*" The act of February 28, 1795, §1 (1 Stat. 424) provides that "*in case of an insurrection in any state against the government thereof,* it shall be lawful for the President of the United states, on application of the legislature of such state, or of the executive (when the legislature cannot be convened) to call forth such number of militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection." There may be other acts of Congress of a similar import, but a consideration of the above (which dates back to an early period in the history of the republic) makes it clear that it is the duty of rhe President when applied to by the duly consituted governor of a state (when the legislature cannot be convened) to protect such state government against insurrectionary overthrow. It must be also obvious that the President is the final judge whether the exigency contemplated by the statute has arisen. See Martin v. Mott, 12 Wheat. 19.

If, therefore, the state government of Missouri or of Illinois, or any other state government concerning the lawful existence of which there is no dispute, were attacked by a domestic insurrection, no doubt could arise as to the President's duty in the premises. But the difficulty in the Arkansas and Louisiana cases arose from the fact that in each case there were *two* governments, each claiming to be the duly elected and legally constituted government of the state. Between these two contending parties, the duty laid upon the president by the constitution and laws, obliged him finally to decide. But whilst this obligation rested upon him, he was not a judicial officer, and obviously had no jurisdiction to hear and determine a case of a contested election for the office of governor of a state; nor had he any superintending jurisdiction which would enable him to revise the judgment of the state tribunal whose jurisdiction it was to hear and determine the question. His duty was obviously limited to supporting that party who had been declared elected by the tribunal having jurisdiction to make such declaration. In the Arkansas case, when the President became satisfied that the legislature was the tribunal having exclusive and final jurisdiction over the question, and that it had decided the question in favor of Baxter, who had been duly declared elected and installed in the office accord-

ing to the forms of law, it became his imperative duty to support Baxter against insurrectionary overthrow, although he may have believed, as most well informed persons did believe, that Brooks had been elected by a clear majority. He could not constitute himself or any of his legal advisers a judge for the purpose of investigating the merits of the case; he could not go behind the decision of the tribunal which had authority to count the votes and declare the result, but to the decision of that tribunal he was obliged to give full faith and credit.

We suggest, therefore, that it is by this standard that the legality of the President's action in the Louisiana case must be judged. If the Kellogg government was declared elected by the state tribunal having jurisdiction to count the votes and declare the result (for no one pretends that Judge DURELL's celebrated order was anything more than a mere nullity) it was the duty of the President to protect his government against insurrectionary overthrow. But on the other hand, if Kellogg was not declared elected by this tribunal, or by the duly constituted tribunal having jurisdiction finally to hear and determine the contest, then he was a mere usurper; and any movement, insurrectionary or otherwise, which resulted in establishing the duly elected state government in power, called for no interference on the part of the general government. We are not sufficiently acquainted with the history of the Louisiana case to express any opinion on these questions.

The Railway Question in Wisconsin—The Potter Law—Injunction to Compel Observance.

The *constitution* of Wisconsin (Art. 11, sec. 1) provides that corporations may be created by general laws or special acts, and then declares: "All general laws or special acts enacted under the provisions of this section may be *altered or repealed* by the legislature at any time after their passage." Under these provisions the Circuit Court of the United States for the Western District of Wisconsin (present Mr. Justice DAVIS of the United States Supreme Court and DRUMMOND, Circuit Judge), some weeks since, sustained the validity of what is known as the Potter law, regulating railway tariffs in that state (*ante*, p. 348). Soon after that decision was pronounced, the attorney-general of the state of Wisconsin, *ex officio*, filed an information in the nature of an injunction bill in equity, originally in the supreme court of the state, the object of which was to compel the Milwaukee & St. Paul Railway corporation to conform to the Potter law, and to that end a preliminary injunction was moved by the attorney-general before the full bench. The motion was resisted by the the company, upon two main grounds: 1st. Because the supreme court of the state had no *original jurisdiction* to issue the writ of injunction. 2d. On the merits, because the Potter law is unconstitutional. On the 15th instant, the supreme court announced its decision overruling these objections, and awarding the writ as asked by the attorney-general.

The following is the provision of the state constitution in relation to the issue of writs by the supreme court, and which it was held did not preclude the remedy sought by the attorney-general on behalf of the state: "The supreme court shall have power to issue writs of *habeas corpus*, mandamus, injunction, *quo warranto*, *certiorari* and other original and remedial writs, and to hear and determine the same." Art. 7, sec. 3. The same section provides that "the supreme court, except as otherwise provided in this constitution, shall have *appellate jurisdiction* only."

The subjoined abstract of the decision of the supreme court granting the temporary injunction, is said to have been prepared by Chief Justice RYAN, of the Supreme Court of Wisconsin, and it bears upon its face such evidence of substantial correctness that we feel justified in presenting it to our readers:

This court has no original jurisdiction of proceedings by injunction at the suit of private persons, or to enforce private remedies, but has jurisdiction of the writ, in matters public, upon information of the attorney-general, in the nature of an injunction bill, to restrain excess where mandamus would not go to remedy the defect. The writ given to this court in a group of prerogative writs is given as a *quasi* prerogative writ for prerogative purposes. Considered and approved independently of secs. 13 and 14, chap. 148, Revised Statutes, courts of equity have jurisdiction, upon information of the attorney-general, *ex-officio*, to restrain corporations from excess or abuse of corporate franchises, or other violation of public law under color of franchise to the public injury. These sections confer no jurisdiction on this court. Whether they operate to limit the jurisdiction of the circuit courts is not here considered. It is for the court to determine, on such an information, whether the acts charged work a public injury. This jurisdiction was an established equitable jurisdiction at the time of the adoption of the state constitution, and sec. 5, art. 1, of the constitution, in relation to trial by jury, has no application to it. Were this otherwise, the questions raised by these informations are questions of law, and the jurisdiction of them in equity deprives the defendants of no right of trial by jury. Chap. 273, of 1874, is not repealed by chaps. 292 or 341 of the same session. All the chapters can and will stand together. The court finds no difficulty in holding that the Chicago, Milwaukee & St. Paul Railroad Company is the corporation designated as the Milwaukee & St. Paul Railroad Company in chap. 273. The corporation is sufficiently indicated by the name used in the statute, although it had a month before added the prefix of "Chicago" to its name. The constitutional amendment of 1871 prohibiting special acts of the legislature for granting corporate power or privileges except to cities is prospective only, and has no relation to existing corporate charters by special acts before the amendment. These may be amended or repealed by special act, as before. The rule established in the Dartmouth College case, is considered and disapproved as far as it is extended to *quasi* private corporations instrusted by charter with public interests so as to constitute them *quasi* public corporations. The rule is followed, nevertheless, by the court, because it is the rule of the Supreme Court of the United States of the construction of a clause in the federal constitution; but the reserved power in the state constitution to alter or repeal corporate charters, was designed to take, and does take, all corporations created under it out of the rule in the Dartmouth College case, and the legislature has the same power over such corporations as if the rule in that case had never existed. *The reserved power to alter or repeal has no other limit in law than is implied in the words used; the power to alter or a power to amend a charter without entirely changing its purpose or character.* The exercise of the power should be under the guidance of extreme moderation and discretion, and should not be oppressive and unreasonable. But all this rests in the legislative discretion. So far as corporate franchises are concerned, the legislature is under a moral obligation not to reduce the tolls of railroads below a fair and adequate amount, but their power over the franchise is absolute. But the power to alter or repeal cannot affect the property of corporations other than the franchise. Such right of property is inviolable.

It is not material here whether the defendants had elected to accept or reject the alteration of their charters. By chap. 273 they were bound to obey the statute, or to discontinue their operations as corporate bodies. In either case, they had no right to conduct their operations in defiance of public law. Chap. 273, of 1874, so far as its provisions are before the court in the cases, is a valid amendment of special charters of the defendants, granted by the state. Whether it would be a valid amendment of the general railroad act of 1872 is not here considered. The territorial charter of 1847 of the Milwaukee & Waukesha Railroad Company, extended by the territorial act of 1848, is the subsisting charter of the railway built under it from Milwaukee to Prairie du Chien. It does not appear in this case whether the charter was accepted and the corporation organized under it before the adoption of the state constitution. There is a presumption in the circumstances that they were. Such being the case, the charter is not subject to the reserved power to alter or repeal; and, as chap. 273 of 1874 would impair the obligation of a franchise of that charter within the rule in the Dartmouth College case, chap. 273 of 1874 cannot be held to apply to the railroad built and existing under that charter if accepted before the adoption of the state constitution.

An information in equity by the attorney-general, *ex-officio*, has the same effect as to answer and injunction as a bill in chancery verified on information and belief. Now, the question is unimportant, because the violation of chap. 273 charged is apparent from the affidavits on both sides. There is a judicial discretion to withhold an injunction and mandamus in aid of private remedies, but there is no such discretion at the suit of the state in matters of public injuries. In such cases writs go peremptorily, *ex debito justiciæ*. The court has discretion to withhold either of the writs in cases of positive public injury. The motions of the attorney-general must be granted, and the writs issue as to all the roads of the Chicago & Northwestern Railway Company, and all of the roads of the Chicago, Milwaukee & St. Paul Railroad Company except the railroad from Milwaukee to Prarie du Chien, built under the territorial charter of 1847 and 1848; but before the writs issue the attorney-general must file in these causes his official stipulation not to prosecute the defendants for forfeiture of their charters for any violations of chap. 273, charged in these informations, before the 1st day of October next, that time being allowed by the court to the defendants to arrange their rates of toll under chap. 273.

This decision fortifies the presumption of the correctness of the judgment of the United States Circuit Court, that under the constitution of Wisconsin, the legislature has quite unlimited control over the railroads of the state. Mr. Senator CARPENTER, one of the ablest lawyers of the country, made an elaborate and forcible argument at Ripon, Wisconsin, on the 16th instant, asserting the same doctrine, to which we shall refer more at length hereafter.

A *mandatory injunction* to compel compliance with a public law is a feature in the case that will not fail to attract the attention of the profession.

Mr. Justice Curtis.

A great man is but a nine days' wonder. When the telegraph announced, in the midst of ths excitement occasioned by the Louisiana troubles, that a great jurist had died quietly in his bed, very few took notice of it, and some of those who did, no doubt asked themselves, "who is Judge CURTIS?"

BENJAMIN ROBBINS CURTIS, was born at Watertown, Mass., November 4, 1809. He graduated at Harvard College, in 1829, was admitted to the bar in 1832, and commenced the practice of law at Northfield, Mass. Soon after he removed to Boston, whose bar numbered in its lists the great names of WEBSTER and CHOATE, MASON and DEXTER. Here his commanding talents brought him into such high repute that in September, 1851, at the early age of forty-one, he succeeded, in obedience to the general desire of the whig party of Massachusetts, to the seat on the Supreme Bench of the United States, made vacant by the death of Mr. Justice WOODBURY.

It is a singular coincidence, that on the happening of Mr. Justice WOODBURY's death, Mr. WEBSTER being in Boston and President FILLMORE at the national capital, each without understanding the other's wishes, singled out Mr. CURTIS as the appropriate recipient of this high honor. On the 10th of September, 1851, Mr. WEBSTER wrote to Mr. FILLMORE, as follows:

A very important vacancy is created by Judge WOODBURY's death. The general, perhaps I may say, the almost universal sentiment here is, that the place should be filled by the appointment of Mr. B. R. CURTIS. Mr. CHOATE is perhaps Mr. CURTIS' leader, and is more extensively known, as he has been quite distinguished in public life. But it is supposed he would not accept the place. He must be conferred with, and I should have seen him to-day, but he is out of town. I shall see him as soon as possible. Every thing being put at rest in that quarter, as I presume it will be the moment I see Mr. CHOATE, I recommend the immediate appointment of Mr. CURTIS. There will be an advantage in disposing of the matter as soon as may be. Judge SPRAGUE is now on his way home from Europe. His friends, no doubt, will urge his pretensions. Judge PITMAN, too, of the District of Rhode Island, is a learned lawyer, an able judge and an excellent man. If an appointment were to be made by promotion from the bench of a district court, it would be very difficult to overlook Judge PITMAN, who has been on the bench more years, by a good many, than Judge SPRAGUE, and working at a much smaller sallary. But in my judgment it is decidedly better to appoint a man much younger than either of these judges. Mr. B. R. CURTIS is of a very suitable age, forty-one; he has good health excellent habits, sufficient industry and love of labor, and, I need hardly add, is in point of legal attainment and general character, in every way fit for the place.

On the same day Mr. FILLMORE wrote to Mr. WEBSTER, with reference to this subject, as follows:

"I believe that Judge MCLEAN is the only whig upon the bench, and he received his appointment from General JACKSON. I am therefore desirous of obtaining as long a lease, and as much moral and political support as possible, from this appointment. I would, therefore, like to combine a vigorous constitution with high moral and intellectual qualifications — a good judicial mind and such age as gives a prospect of long service. Several distinguished names have occurred to me, but I do not consider myself so intimately acquainted with the New England bar as to be able to form a correct opinion. I have, however, formed a very high opinion of Mr. B. R. CURTIS. What do you say of him? * * Does he fill the measure of my wishes?

Two days later, Mr. FILLMORE wrote to Mr. WEBSTER in reply to the letter first above quoted, "I am happy to see that we both concur in opinion as to Mr. B. R. CURTIS. I will wait till you can see Mr. CHOATE, and if all is satisfactory, I will issue the commission at once." Soon after, Mr. FILLMORE having learned that Mr. CHOATE concurred in the general desire that Mr. CURTIS should receive the appointment, issued the commission to him.

The "moral and judicial power," as Mr. FILLMORE expressed it, of the two whig members of the bench, Mr. Justice MCLEAN and Mr. Justice CURTIS was shown in their dissenting opinions in the memorable Dred Scott case, 19 Howard, 529–633. Mr. Justice CURTIS' opinion alone covered ninety pages of closely printed matter. His disagreement with the majority of the court on the great questions involved in that case, is supposed to have been one of the causes which induced his resignation, which took place a year latter, in the fall of 1857. On retiring from the bench, he returned to Boston and resumed an extensive practice at the bar, in which he continued, until the sickness which resulted in his death. During this period he served two years in the legislature of his state. Notwithstanding what might be inferred from his dissenting opinion in the Dred Scott case, he was, during the latter years of his life, a democrat in politics, and his name was frequently mentioned as the possible candidate of that party for the presidency. On the death of Mr. SUMNER, he was the candidate of his party for the seat in the United States senate thus made vacant; and during the whole of that protracted contest, their vote was cast solidly for him.

The published works of Mr. Justice CURTIS would have given his name a place in the memory of the legal profession, if he had never acquired any fame as a jurist. While on the bench he found time to edit two volumes of circuit court reports, the former of which was published in 1854, the latter in 1857. These volumes comprise the most valuable part of his labors while presiding justice of the first circuit. But his wonderful diligence and capacity for labor are shown in the fact that he found time in the midst of the arduous duties of his judicial position to edit in a greatly abridged form, and with head-notes entirely re-written, fifty-eight volumes of the reports of the decisions of the Supreme Court of the Unired States. These he compressed into twenty-one volumes and added a digest, the whole being completed before his retirement from the bench. The value of this edition is greatly enhanced by

the fact that each case is followed by references to kindred decisions. A continuation of it is now being edited by Mr. Justice MILLER.

One of the great acts of the concluding portion of Mr. Justice CURTIS' life was his participation in the trial of the impeachment of President JOHNSON. He delivered the opening speech in defence of Mr. JOHNSON — an effort which fully sustained his great reputation. One of the last acts of his professional life was an opinion in which he held the "Potter" Wisconsin railroad law to be in derogation of the constitution of the United States and void. A contrary view of the question has been taken by a federal circuit court, composed of Mr. Justice DAVIS and Mr. Circuit Judge DRUMMOND, and this view is now fortified by the unanimous judgment of the Supreme Court of Wisconsin in an opinion of great length, a synopsis of which we publish elsewhere. But the question remains to by passed upon by that court whose judgment can alone decisively and authoritatively settle it.

Judge CURTIS was what may be termed a *working*, rather than a *jury* lawyer. He could not employ in the contests of the bar the commanding eloquence of Mr. WEBSTER, nor did he possess anything akin to the subtle and almost universal genius of Mr. CHOATE. But his logic was of a broad and masterly character, and his intellect was vigorous and penetrating. Add to this the almost superhuman capacity for labor which he possessed when in good health, and we have the key to the secret of his great success. He doubtless left behind a few who may claim equal eminence with him at the American bar, but they can almost be counted on the fingers of one's hand.

[From the Irish LAW TIMES Reports.]

Master and Servant — Negligence of Captain of Merchant Ship — Injury to Sailor on Board — Liability of Owner of Vessel.

RAMSAY v. QUINN *et al.*

Irish Court of Common Pleas, June 11th and 29th, 1874.

Before MONAHAN, Ch. J., and MORRIS, J.

1. **The General Rule in such Cases.**—To render an employer liable for injury to one in his employ, through the negligence of another person also in his employ, it must be shown that the latter was not merely a fellow-workman, but was placed in a position of such authority as fairly to represent the employer himself.

2. **Exception—Captain and Seaman.**—The captain of a merchant-ship under his control and management is not a mere fellow workman of the seamen on board, bound to obey him, but is such an agent or representative of the owner of the vessel, that the latter, by whom he has been appointed, will be liable for an injury to a seaman, sustained by him through the captain's negligence during the voyage, while the seaman is acting in obedience to an order given by the captain.

Demurrer.—The first count of the summons and plaint was as follows: "For that, at the time of the committing of the grievances hereinafter mentioned, the defendants were possessed of a certain ship called "The Vespa," then being navigated by their servants under the sole control and management of one William M'Cullagh, who was captain of said ship, appointed in that behalf by the defendants, and as such captain governed and directed the said ship and the seamen and servants thereof, and whose orders as such captain the said seamen and servants were bound to obey. And one John Ramsey, for certain hire and reward therefor to be payed to him, agreed with the defendants to serve and do the work and duties of an able-bodied seaman on board the said ship, under the control and orders of the said captain, during a certain voyage from Troon to Belfast, and the said John Ramsey thereupon entered on board the said ship as such seaman upon the terms aforesaid, and the plaintiff says that, whilst said ship was on said voyage and the said William M'Cullagh was captain of said ship as aforesaid, the defendants' said captain negligently, unskilfully, and improperly ordered the said John Ramsay and the other seamen on board the said ship to abandon said ship, and the said John Ramsey and the other seamen did, in obedience to the said orders, and as they were bound to do, then proceed to abandon the said ship, by reason whereof the said John Ramsey, whilst he was in the act of so abandoning said ship, in obedience to and in execution of said order so unskilfully and improperly given as aforesaid by the defendants' said captain, was drowned, and within twelve calendar months next before this suit, lost his life."

Demurrer, on the grounds that the above count disclosed no personal negligence on the part of the defendants; that the captain and John Ramsay were fellow-servants, and that the only negligence averred was that of the captain; that the count did not state, or show any obligation on Ramsay to obey the order; that the facts alleged disclosed no obligation on the defendants; that, if the order were unlawful, Ramsay was not bound to obey it, and if lawful the defendants were not liable.

Boyd, in support of the demurrer. The defendants are not liable unless they have been guilty of negligence in the selection of the captain of the vessel, and yet no such negligent selection is averred. When one fellow-servant has been injured by another fellow-servant, the master is not liable, unless he has been guilty of negligence in selecting an unskilful or incapable servant in the person who has done the injury. Tarrant v. Webb, 25 L. J. C. P. 261; Wilson v. Merry and Another, L. R. 1 Sc. App. 327; Bartonshill Coal Co. v. Reid, 3 Macq. H. L. 282. The captain of a vessel and a seaman, notwithstanding the difference of their social positions and the nature of their employment, are fellow-servants. Tarrant v. Webb. Again, the plaint alleges that the captain "negligently, unskilfully, and improperly ordered" the deceased to abandon the the ship, and that while acting "in obedience to said order," and as he was "bound to do," he was drowned. Now, if this order were such as described, the deceased was not bound to obey it, and if the order was a proper one, and in obeying it the deceased lost his life, the defendants were not liable.

M'Mahon, Q. C. (with him *Frazer*), *contra*. The captain of the vessel is the agent of the defendants, and for an act negligently done by him resulting in the death of the deceased, they are liable. He is not a mere fellow-servant of each member of his crew. In Story on Agency (7th Ed. p. 124-128), the peculiar official position of the captain of a vessel is defined. He can hypothecate the ship; he is treated not as an ordinary agent, but as a special employer or the owner of the ship; he unites in himself the double powers of the absolute and temporary owner or charterer of the ship; the law treats him as having a special property in, and charge of the ship. The master of the ship is the person entrusted with the care and management of it, and the employers or owners of a ship are responsible for the contracts of their captains, while they are not responsible for the contracts of their mariners, because these latter are not appointed for the purpose of conducting the business of the ship, but only for laboring in its navigation under the orders of the master. Abbott, Shipping Laws, 11th ed. 93, 101-2. If a captain of a vessel be guilty of any default of duty, his employers are responsible for his acts in those things that respect his duty under them, though they are not answerable for his conduct in those things which do not respect his duty to them, *e.g.*, if he commit an assault on the voyage. Ellis v. Turner, 8 T. R. 531. Again, the mariner is bound to obey every lawful order of his captain. Once the voyage commences, it is his duty to navigate the ship at all perils. No matter what danger he may incur, he is entitled to no special remuneration, because he simply performs his duty. Abbott, Shipping Law, 153. Even when an order to abandon the ship has been given *bona fide* to the crew, although the danger did not justify such an order, yet the crew is justified, and therefore bound to leave her. "The Florence," 16 Jur. 573.

Boyd, in reply. *Cur. adv. vult.*

MORRIS, J.—The defendants have demurred in this case to the first count of the summons and plaint. The widow of a seaman named John Ramsey, has brought this action against the owners of a vessel called "The Vespa," to recover damages for the death of her husband. The count which has been demurred to, states that the ship was under the sole control of one William M'Cullagh, who was the captain of the ship, and appointed to that post by the defendants, that acting in that capacity he governed the ship and the crew, and that the crew were bound to obey all orders given by him, as captain. It then states that the deceased, Ramsey, entered into the defendants' service as an able-bodied seaman, and that as such he went on board "The Vespa," commanded by said William M'Cullagh. It next states that the deceased started on a voyage, and that during that voyage the captain negligently, unskilfully and improperly ordered the said Ramsey and other seamen to abandon the ship, and that in obedience to such order, and as they were bound, the deceased Ramsey and the rest of the crew proceeded to abandon the ship, and in the execution of the order Ramsey lost his life. The demurrer is taken on the ground that no action will lie against the owners of the ship, upon the authority of a great number of authorities, commencing with Priestly v. Fowler, 3 M. & W., and culminating with Wilson v. Merry, L. R. 1 Sc. App. 326. All these cases establish that no action will lie against an employer for injuries to one fellow-servant through the negligence or want of skill of another fellow-servant, no matter in what capacity he may be, provided both are the servants of the same person. The distinction between the ordinary case of fellow-workmen and that where one of the parties employed occupies a position superior to that of the other—being, for example, a foreman or superintendent—appears to have been removed by Wilson v. Merry. But in that case I find nothing repugnant to the principles laid down in Murphy v. Smith, 19 C. B. N. S. 361, that when an employer has an agent or representative, held to be so by the jury, and who is not merely a fellow-workmen of the party sustaining the injury, the employer is liable for an injury to his servants, occasioned by the neglect or unskilfuness of his agent or representative.*

Now, in what class are we to place the captain or master of the vessel in this case? Is he merely the fellow-servant of the deceased, or the agent and representative of the defendants? In my opinion he comes within the latter class. He is the agent and representative of the owners during the voyage. His position is thus defined in the best books on this subject. So he has authority to bind the owners for repairs and necessaries, and it is within his competence to settle claims for demurrage.

That being so, and coupled with the statements in the summons and plaint, that the ship was under the control and management of the captain, that he was appointed by defendants, that he governed and directed the ship, and that the seamen on board were bound to obey his orders, we consider that, the liability of the defendants depending on the question whether the captain was the agent or representative, that question cannot be decided in their favor on demurrer to the count. The demurrer must be overuled. Any other question the defendants wish to raise must be raised by a plea to the count.

MONAHAN, C.J.—I quite concur with my brother Morris in the judgment he has given. But I would prefer to rest my opinion on the averments in the summons and plaint as to the authority delegated by the defendants to the captain, all which averments the demurrer admits. Resting my opinion on those averments, the demurrer must be overruled.

DEMURRER DISALLOWED.

Plaintiff's attorney: *John Rea.*
Defendant's attorney: *W. Harper.*

*See the cases fully collected, 2 Tay. Ev. 6th Ed., 1,027; Smith, M. & S. 3rd Ed. 207-8.—[ED., *I. L. T. Rep.*]

—THE democrats of New York have nominated Hon. Theodore Miller for judge of the court of appeals.

Alienation of Homestead by Husband Without Consent of Wife—Remedy of Wife.

PARALEE WILLIAMS, BY NEXT FRIEND, v. J. B. WILLIAMS, *et al.*

Supreme Court of Tennessee, April Term, 1874.

Hon. A. O. P. NICHOLSON, Chief Justice.
" P. TURNEY,
" ROBERT MCFARLAND,
" JAMES W. DEADERICK,
" THOS. J. FREEMAN,
" JOHN L. T. SNEED, } Judges.

Alienation of Homestead without Consent of Wife—Wife's Remedy—Bill quia Timet.—Under the constitution and laws of Tennessee, a conveyance of the homestead property by the husband, without the wife joining in the conveyance, is absolutely void; but such a conveyance, nevertheless, so far endangers the rights of the wife, that she may maintain a bill in equity to remove the cloud from her title, and have her homestead rights declared.

Mr. Chief Justice NICHOLSON delivered the opinion of the court.

J. B. Williams, being the owner in fee of a small tract of land in Henderson county, which, with the improvements thereon, was worth less than $1,000, on the 28th of December, 1872, sold and conveyed the same to John M. Meals, and executed to him a deed in fee simple, with covenants of seizin and general warranty. In this conveyance, complainant Paralee, who is the wife of said J. B. Williams, did not join. By her next friend she files her bill, alleging these facts, and also that this tract of land is all the real property owned by her husband or herself, and that at the time of the conveyance, her husband and herself were in the actual possession of the land as their homestead, and that they still continue in possession thereof, but that the deed so made by her husband, without her joining therein, constitutes a cloud upon her rights under the homestead law, and she prays that the cloud be removed, and her rights declared and protected. The bill was filed against J. B. Williams and J. M. Meals, as to both of whom the bill was taken for confessed.

Upon the hearing, Chancellor NIXON dismissed the bill, and complainant has appealed.

The constitution secures a homestead, in the possession of each head of a family, and the improvements thereon, to the value, in all, of one thousand dollars, and exempts the same from sale under legal process, during the life of such head of a family. The plain intention of this provision is, not merely to protect the husband, or the head of the family, in the possession and enjoyment of the homestead, but the protection of the interests of the wife and the minor children, constituted a leading consideration for the adoption of the provision. This fact is apparent, by the prohibition against the alienation of the property without the joint consent of husband and wife, when that relation exists. To give complete protection to the wife and children, the homestead is not only exempt from the reach of creditors of the husband, but he is deprived of the power to defeat the enjoyment of the homestead by his wife and children, by selling and conveying it, except by deed in which she joins. And the legislature in giving legislative effect to these provisions, requires that the conveyance shall be regulated by the laws as to the conveyance of land by married women; that is, the conveyance can be effective only upon the privy examination of the wife. Code, sec. 2114 a.

It is manifest from these constitutional and legislative provisions, that while possession of the homestead is the essential feature in the exemption from sale under legal process, or by the deed of the husband, the wife is recognized as having a present, subsisting and continuing interest in the maintenance and preservation of the benefits of their possession, and that she has such a right in the land, connected with the right of possession, that when that right is violated she is entitled to claim the protection of the courts.

In the present case, the husband has undertaken, in contravention of the express prohibition of the constitution and the statute law, to convey the entire title of the homestead tract, without the consent, and against the will of his wife. It is now a rule of property, made permanent by the fundamental law, that every head of a family is deprived of the right to alienate the homestead, unless his wife joins in the conveyance. It follows that such conveyance is absolutely void, and communicates no title to the purchaser, so far as it abridges or interferes with the wife's homestead right, and the wife by her next friend, has such an interest in the preservation of the homestead, as entitles her to invoke the protection of a court of chancery, by bill *quia timet*, to have the cloud upon her rights removed, and her homestead rights declared.

The decree of the Chancellor will be reversed with costs, and a decree rendered here in accordance with this opinion.

DECREE ACCORDINGLY.

Fraudulent Title Deeds.

The secretary of state of New Jersey, who, under the laws of that state is also *ex officio* insurance commissioner, has been investigating the affairs of the Palisades Insurance Company, a rotton concern doing business at Jersey City, and the investigation has disclosed the fact that the assets (!) of the company (nominally about $200,000) consist entirely of spurious bonds and mortgages upon real estate in New York, Brooklyn and Jersey City.

It has also led to the discovery of an organized system of swindling by the officers of the company and their confederates through the medium of forged title papers to real estate in the cities above mentioned. In the preparation of these instruments no formality which would aid in carrying out the deception was overlooked; they appeared to be in all respects regular in form and substance, duly executed, acknowledged and recorded, and when produced by the victims were in each case accompanied by full abstracts of title given by well known, trustworthy and competent, but unsuspecting lawyers.

The full extent of these forgeries is not yet known; already, however, the disclosures are of such a character as to have produced a feeling of uneasiness, apprehension and distrust amounting almost to a panic among mortgagees, owners and dealers in real estate. A New York paper thus describes the situation: "Every one who owns real estate, or has lent money on real estate security is eagerly examining his titles, or anxiously comparing the signatures on his conveyances, to prove their genuineness. The traffic in real estate has therefore almost ceased. The conspirators moulded to their purposes the very legal requirements that were intended as the safeguards of real property. The registration of conveyances was designed to render them indestructable and indubitable, to spread before every purchaser the full chain of ownership of what he wished to buy. By a single slip, one forged link in the chain, albeit surrounded by the same legal restrictions as the genuine, the safest of all investments is made the most untrustworthy, and the hundreds and thousands of inheritors and accumulators of bond and mortgage securities are aroused to the fact that their fancied securities may be worthless."

The facility with which certificates may be obtained from justices of the peace and other officers authorized to take acknowledgments to instruments affecting the title to real estate renders the perpetration of frauds of this description an easy possibility. So far as our observation has gone, all that is necessary is for some person to appear before the officer, acknowledge the deed to be his act, pay the requsite fee, and thereupon solemn attestation will be made under the hand and seal of the officer that the party constituent "*is personally well known*," to him, notwithstanding the fact may be that such party was an entire stranger, of whose identity he knew absolutely nothing, and of whom he had never heard before that particular occasion. Under an issue involving the genuineness of an instrument, the acknowledgment to which was taken under such circumstances, the valueless character of the testimony of the officer must be apparent.

Such certificates are neither a compliance with the letter nor spirit of the statute, and the looseness of the practice which prevails in this respect renders necessary greater circumspection on the part of those who are directly interested.—[*Washington Law Reporter.*

[Communicated.]

The Administration of Law in Kentucky.

EDITORS CENTRAL LAW JOURNAL:—I have been accustomed to read your excellent journal, with pleasure and profit, since its establishment. During this time I have rarely, if ever, had occasion to dissent from the views advanced, or statements of facts contained in your editorials. You will pardon me, therefore, while I call your attention, and the attention of your readers, to an articie that appeared in the CENTRAL LAW JOURNAL, for September 10th, 1874 (*ante*, p. 448), under the title of the "Administration of the Law in the South," for the purpose of correcting, what appears to the writer, to be an erroneous statement concerning the laws of Kentucky.

In doing this, it is not my purpose to inquire into, or discuss the causes that have led to the rather unusual state of affairs that has existed, very recently, in some portions of this commonwealth. But I must be permitted to say that the extract from the Louisville Courier-Journal, incorporated into the article alluded to above, and which pretends to describe the condition of affairs in Kentucky, is more sensational than truthful. It is true the times are sadly out of joint, in this, as well as other states that do not lie *south* of Kentucky; but withal, I venture the assertion, that, with the exception of a few counties —not exceeding five or six—life and property are just as secure in this commonwealth as they are in the northern or western states.

In the article alluded to, on the "Administration of the Law in the South," you accept, as true, the condition of things described by the extract from the Courier-Journal, and refer it to two causes—"for one of which the people are responsible," you say, and for the other, the courts; and by way of fixing the responsibility upon the courts, you refer to the fact, that "as early as 1822 the Court of Appeals of Kentucky, decided that a statute, prohibiting the carrying of concealed weapons, was unconstitutional," and that "this rule" has only been changed "*within a comparatively recent period;*" and cite, as evidence of this change, and I infer the *time of the change* also, the very late authority of Hopkins v. Com., 3 Bush (decided in 1868), and Cutsinger v. Com., 7 Bush, decided in 1870. In this you erred, as the "rule" had been changed long before either of these cases was decided.

In the present constitution of Kentucky, which went into effect on the 11th day of June, 1850, it is provided in art. 13, sec. 25, "that the rights of the citizens to bear arms, in defence of themselves and the state, shall not be questioned; but the General Assembly may pass laws to prevent persons from carrying concealed arms."

In pursuance of the authority granted by the constitution, the general assembly passed an act to prohibit the carrying of concealed deadly weapons, March 10th, 1854; (Stan. Rev. Stat., p. 414); and since that time, amendatory and distinct acts, upon this subject, have been passed, and the penalty for carrying concealed weapons has been gradually increased, from a small fine, until now the penalty is a fine from $25 to $100, *and* imprisonment, in the county jail, from ten to thirty days. Gen. Stat., p. 359.

Since the passage of the law of March 10th, 1854, the laws upon the subject of concealed weapons have been uniformly upheld by the courts of this state, and the most rigid construction given these statutes, consonant with the rules of law, for the purpose of insuring the conviction of offenders; and in one instance (Cutsinger v. Com., 7th Bush), the court has decided that a person carrying a pistol concealed, although proven for a *harmless* purpose, is a violator of the law, and subject to its penalties. Hence you will see that the "rule" was changed more than twenty years ago, and not "within a comparatively recent period."

Leaving the law of concealed weapons and passing to that of homicide, you say, in the article alluded to, that "since the late war the same court has, in a series of decisions, enunciated the extraordinary and startling doctrine that a man whose life has been threatened, by another, *may kill his adversary on sight*, whenever and wherever he may chance to meet him;" and reference is made to Phillips v. Com., 2 Duvall; Carico v. Com., 7 Bush, and Bohannon v. Com., 8 Bush.

Whatever warrant there may be, in the cases in 2 Duvall and 7 Bush., for the "extraordinary and startling doctrine" above referred to by you, there is certainly none to be found in the case last quoted, of Bohannon v. Com., 8 Bush, 481. Upon the contrary, the law is stated with clearness by Lindsay, J., who delivered the opinion of the court as follows:

"However this may be, the *threats* of even a desperate and lawless man, *do not, and ought not, to authorize the person threatened to take his life;* nor does any demonstration of hostility, short of a manifest attempt to commit felony, justify a measure so extreme.

"But when one's life has been repeatedly threatened by such an enemy, when an actual attempt has been made to assassinate him, and when, after all this, members of his family have been informed by his assailant that he is to be killed, on sight, we hold that he may lawfully arm himself to resist the threatened attack. He may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose; and if upon such an occasion he *casually meets* his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man, and the circumstances attending the meeting, he has a right to believe that the *presence* of his adversary puts his *life in imminent peril*, and he can *secure his personal safety in no other way* than to kill him, he is not obliged to wait until he is actually assailed. He may

not hunt his enemy and shoot him down like a wild beast, nor has he the right to bring about an unnecessary meeting, in order to have a pretext to slay him; but neither reason, nor the law, demands that he shall give up his business and abandon society to avoid such a meeting."

The opinion from which this ext act is taken was pronounced in 1871, and surely does not enunciate "the extraordinary and startling doctrine" that "a man, whose life has been threatened, may kill his adversary on sight, whenever and wherever he may chance to meet him;" and the other cases in 2 Duvall and 7 Bush, have rarely, if ever, been so construed. However that may be, they are expressly overruled in the case of Bohannon v. Com., above cited, and are not the law when they conflict with that case. The principles above enunciated by Judge Lindsay are so reasonable and just that there would be little "security for life" in a state whose code of laws did not recognize them. KENTUCKIAN.

REMARKS.—On reading the foregoing, we cheerfully concede that we were in error as to the matters indicated by "Kentuckian." We did not wish to make any invidious comparisons between different sections of the country. We desire to have what we wrote considered, as John Randolph would have expressed it, "the *verba ardentia* of an honest mind," sincerely desirous of seeing the supremacy of the law vindicated everywhere. We do not forget that the South occupies an exceptional position, from the fact that her population is composed of two races, so distinct in all their characteristics, that social science despairs of ever seeing them moulded into a homogeneous people. Nor do we forget that those states have lately been the theatre of a desolating civil war, and that such wars have never failed to leave behind for years after their cessation, traces of strife and disorder. We admit that the times are "sadly out of joint" in the North as well as in the South. We remember the time (in the year 1854) when it was claimed that there was not a person in jail in the state of Vermont; and now it is reported that murders have become so frequent in that commonwealth, that some of the inhabitants talk of emigrating on that account.

Obtaining Money by False Pretences—Evidence of Obtaining it on Prior and Distinct Occasions.

The recent case of The Queen v. Francis (22 W. R. 663) is one of much importance as regards the law of evidence in criminal cases. The question whether it is allowable in prosecutions for obtaining money under false pretences to give in evidence other instances of the obtaining of money under similar circumstances, has hitherto been involved in uncertainty. In R. v. Robuck (25 L. J. M. C. 101), where a prisoner was indicted for fraudulently obtaining money from a pawnbroker by pretending that a chain which was not silver was a silver chain, evidence was admitted to prove that the prisoner, a few days after the offence charged in the indictment, offered a chain similar in appearance to another pawnbrowker as a silver chain, requesting him to advance money upon it. Objection was made to the admissibility of the evidence, and the point was reserved, but the judgment in the Court of Criminal Appeal turned upon another point. In R. v. Holt (9 W. R. 74) a commercial traveller, employed to take orders, but forbidden to receive moneys, obtained money by falsely pretending that he had authority to receive it. Evidence that he had subsequently obtained money from another customer by a like false pretence was admitted, and the prisoner was convicted. The question was reserved whether this evidence was rightly admitted, and the court quashed the conviction, saying that on the facts stated in the case they could not find any ground for saying that the evidence was admissible. In neither of these cases did counsel appear for the prisoner; in the former the point as to the admissibilty of the evidence was not raised in argument (see 25 L. J. M. C., at p. 102, note) or adverted to in the judgment, and in the latter, no reasons are given by the judges.

In a recent case, however, the point was expressly reserved and fully discussed, and the court lay down a rule upon the subject. The facts, so far as they concerned the abstract point of law, were very simple. The prisoner obtained money by pretending that a certain ring was made of diamonds, when in truth it was composed of crystals. In support of this charge, evidence was given that on a prior occasion the prisoner had obtained money by pretending that a silver chain coated with gold was made of pure gold. This latter piece of evidence was objected to as inadmissible, and the point was reserved, but the Court of Criminal Appeal held that it was admissible. "It seems clear upon principle," said Lord COLRIDGE, C.J., in delivering the judgment of the court, "that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether, at the time he did it, he had guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake."

The question may be put thus: In a series of similar transactions by the same person, which is more probable — repeated error or repeated fraud? If this question were put barely, the answer must be, repeated error is more probable than repeated fraud, for error is more common than fraud. But add the circumstances that the transactions are of a lucrative kind, that the statement is in each case are of essential importance to the transaction (and is not therefore made *per incuriam*), and that the untrue statement is always in favor of the person making it, and the question must be answered differently. The man who in a series of lucrative transactions makes statements which are in fact untrue, and which are always to his own advantage, may properly be held guilty of fraud, unless he is able to offer a satisfactory explanation. But by what accumulation of circumstances is the mere suspicion of fraud which a single such instance raises changed into such a certainty of fraud as will justify a finding of fraud as a fact? It is impossible to say. But each instance increases the weight of the evidence.

Take the analogous case (which has been recognized by the legislature) of uttering counterfeit coin coupled with the possession of other pieces of counterfeit coin (24 and 25 Vict. c. 99, s. 10). Can it be denied that the possession of other counterfeit coins give good reason to suppose that the utterer knew the coin to be couterfeit? But how many counterfeit coins possessed will lead to the inference of knowledge? Clearly a roll or packet of coins would be conclusive. But the possession of one coin is some evidence. Is there any difference between the nature or grounds of the inference in this case and in that in question?

There are many circumstances to be taken into account in estimating the *weight* of such evidence. The lapse of time, making exact proof of the circumstances imputing guilt, or tending to exonerate, difficult; the number of articles or instances, and many other circumstances not admitting of definite description, must be brought carefully before the jury, and are likely to be fairly and candidly considered by them. But if any such instance *tends* to prove the knowledge which is in question—and it must be admitted that it does so tend—there seems no ground on which it can be pronounced inadmissible.

The reason of practical necessity on which the admission of such evidence has been based is in itself not complete; but, as a supplementary argument, is of great weight. That reason is thus expressed by HEATH, J., in Whiley's case (2 Leach C. C., at p. 935)—"The charge in this case puts in proof the knowledge of the prisoner, and, as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances." Unles indirect proof of the guilty knowledge is admitted, it would be impossible in many cases to prove this essential element in the offence.

It has been urged, on the other hand, that upon principle it seems difficult to stop short of the admission of evidence of independent acts to show the prisoner to be a bad man, for that is to make it less likely that he was acting under a mistake; but evidence of particular acts to show bad character is not admissible. It may be difficult to draw the line in principle, but is it not perfectly defined in practice? The admission of evidence to prove that a prisoner has been pursuing a course of acts of a similar kind to that with which he is charged, where guilty knowledge of a particular set of facts is one of the issues to be proved, is a different thing from admitting evidence of any criminal act to prove a general bad character. The difference between the two cases is greatest in the point which is alleged as constituting the strongest objection to the admission of the former kind of evidence—the alleged hardship on the accused caused by taking him by surprise and so depriving him of the opportunity of rebutting the evidence. In the first case the prisoner or his advisor must be aware that guilty knowledge is one of the facts to be proved against him: that it cannot be proved from the circumstances of the transaction itself, and that if proved at all it must be proved from certain previous transactions *of a similar nature*. There is a specific class of acts pointed out, as to which the prisoner must be prepared with evidence. On the other hand, if evidence of acts showing general bad character were admissable to prove guilty knowledge, the prisoner would be without clue as to what kind of offence would be given in evidence. "The observation respecting prisoners being taken by surprise, and coming unprepared to answer, and to defend themselves against extrinsic facts," says Lord ELLENBOROUGH in R. v. Whiley (2 Leach. C. C., at p. 985), "is not correct. The indictment alleges that the prisoners altered this note *knowing* it to be forged, and they must know that without the reception of other evidence than that which the mere circumstances of the transaction itself would furnish, it would be impossible to ascertain whether they altered it with a *guilty knowledge* of its having been forged or whether it was altered under circumstances which showed their minds to be free from that guilt."

Still we cannot but feel that (since it is not to be presumed that prisoners will have the benefit of legal advice) an indictment merely charging the prisoner with a particular act does not give him such warning as he is entitled to, that other similar acts will be put in evidence, and we would repeat what we said

before (17 S. J. 479) with reference to the question of evidence raised in R. v. Cotton, that it seems to us worthy of consideration whether the true remedy for the alleged hardship on the prisoner caused by the admission of the class of evidence to which we have referred, would not be to change the fixed practice which now prevails, and to indict the prisoner in one indictment for all the cases of false pretences in respect of which evidence is proposed to be given.—[*Solicitors' Journal.*

Book Notices.

MEMORIES OF WESTMINISTER HALL. By EDWARD FOSS. Vol. II. James Corkcroft & Co., N. Y. Soule, Thomas & Wentworth, St. Louis, Mo. 1874.

The second volume of this interesting collection of incidents, anecdotes and historical sketches, relating to Westminister Hall is published, and fully justifies the character which we ascribed to the first volume. This volume is made particularly interesting by its very full and clear account of the Tichborne trial, accompied by illustrations of the court and counsel, and *fac similes* of the hand writing of Roger Tichborne and Arthur Orton, as shown in letters introduced on this remarkable trial.

LIVES OE THE CHIEF JUSTICES OF ENGLAND. Contiuation by Sir JOSEPH ARNOULD, late judge of the High Court of Bombay. Vol. 6. St. Louis: Soule, Thomas & Wentworth, 1874.

This volume brings down the Lives of the Chief Justices, to the retirement of Lord Denman, in 1850, and the appointment of Lord Campbell as his successor. Lord Campbell wrote the lives of the chief justices to Denman's time, and the 5th and 6th volumes of the present edition (the handsomest and best ever published in this country) are appropriated to Arnould's life of Denman, who for over seventeen years, filled so honorably and ably, the high office of Chief Justice of England. Denman presided in the court during an important era in the history of our more recent jurisprudence, and earned the title of the "good and great" chief justice. Mr. Edward Everett in a letter to him, on the occasion of his resignation truthfully observed: "Your course as a statesman and magistrate, and in both capacities, as a great asserter of liberal principles, has probably commanded a more unanimous sympathy in the United States than even in your own England." Every American lawyer will feel a more intimate acquaintance with English law, by reading the lives of these sages—lives full of struggle, but crowned with lasting and well deserved honors.

Notes and Queries.

BURLINGTON, IOWA, Aug. 31, 1874.

EDITORS CENTRAL LAW JOURNAL:—Suppose I should desire to take the deposition of a witness, a resident of any country in Europe; for illustration say Berlin, Prussia, the testimony to be used in trying a cause in Iowa. How would I proceed to get the deposition? Please answer fully.

CONSTANT READER.

ANSWER.—A commission (*dedimus potestatem*) should be sued out of the office of the clerk of the court, upon "reasonable notice," directed to some *commissioner of deeds, notary public, consul* or *consular agent* of the United States, either by name or by the designation of his office, within the limits of whose official jurisdiction the witness is. Iowa Code of 1873, §§ 3725-3727. We are not aware that any of the American States have "commissioners of deeds" in foreign countries. It would seem clear that such a deposition could, under section 3725 of the Iowa code, be taken before a notary public in England, or a notary France, or before the corresponding officer in Germany. But the safest way would be to write to the secretary of state for the name of the consul or consular agent of the United States, within whose jurisdiction the witness is, and direct to such consul or consular agent a commission, with interrogatories, as in other cases, enclosing an adequate fee.

Another mode, which it is supposed any court of justice may resort to, indepently of any statute and by virtue of its inherent powers, is by a *letter rogatory*, addressed to a foreign tribunal within whose jurisdiction the witness is, requesting such court, *in furtherance of justice*, to cause the deposition to be taken, and promising to do the same thing, when required, for the court of which this favor is requested. This mode of taking the depositions of witnesses residing abroad, is detailed in 1 Greenleaf on Evidence, § 320 and note 3. It may be added that, in taking such a deposition, the forms of our law, and not of the foreign law, must be pursued. The letter rogatory should therefore be accompanied with the usual *instructions*.

ST. LOUIS, MO., Sept. 12, 1874.

EDITORS CENTRAL LAW JOURNAL:—A. is renting a store by the month from C., at $40 per month. B. offers him $200 to move out and give him possession. A. accepts the offer with proviso that he be allowed to remain until he gets another house. In two weeks time he moves out and tenders the key to B., which B. refuses to accept.

The contract was not in writing. Was it within the Statute of Frauds? Is it an "interest in lands?" W. F.

We shall be pleased to have some of our readers answer the above question and refer to the authorities bearing upon it.

JACKSON, TENN., Sept. 13, 1874.

EDITORS CENTRAL LAW JOURNAL:—A. is a citizen of Tennessee, and as such is entitled to the benefit of the exemption laws of said state. He, however, concludes to move to Illinois, and in pursuance of this intention goes to Illinois, selects a location, and writes to his family and friends hear that he has determined to locate in I., in the state of Illinois. He soon after returns to Tennessee, sells off a portion of his property, boxes up the remainder, marks the name of his future home in Illinois on the different articles, and hauls them to the depot for shipment, when they are attached. He moves his family to Illinois, comes back to Tennessee, and replevies the goods attached, claiming them under the exemption laws of the state of Tennessee. When does a person cease to be a citizen?

Please give us an article in your next settling the points raised by the above stated facts, and oblige yours truly, T. A. B.

ANSWER.—One of the editors of this journal is preparing for publication an extended essay on the law of homesteads and exemptions. When he gets to the chapter embracing the above named topic, he will endeavor to comply with the above request.

Summary of our Exchanges.

The Irish Law Times, for August 29, has leaders on Irish Municipal Elections, The British Association at Belfast, the Irish Jury System, and the Principles of Life Assurance. Its reports contain in Cleary v. Lenihan, an intersting decision in the law of slander, which we shall notice in our notes of cases hereafter and in Ramsey v. Quinn, an interesting exposition of the law of master and servant, holding that the master of a ship and a seaman are not *fellow-servants* within the rule which exempts the master from liability for injuries committed by one servant on another, while engaged in a common employment. This we publish in full this week. It also pays Mr. Justice WAGNER, of the Supreme Court of Missouri, the compliment of republishing his able opinion in Harriman v. Stowe (*ante*, p. 400). It also reports other cases, but they would not be of interest to our readers.

The American Law Times Reports, for September, contain Hill v. Whitcomb, United States Circuit Court, District of Massachusetts (Shepley, J.) infringement of patent. Also Grover & Baker S. M. Co. v. Florence S. M. See 18 Wall. 553. Also Brady v. American Steamship Co., which we have heretofore noticed.

Also three decisions in bankruptcy of Mr. District Judge Blatchford; that in *re* Scull, which we have already noticed (*ante*, p. 399); that in *re* Hill, where the learned judge holds that the signature of his *initials* to a memorandum upon the petition prior to June 22, 1874, do not warrant the signing of an order of adjudication, after that date, *nunc pro tunc*; and that in *re* Keeler, where he holds that the admission of the debtor that the terms of the law have been complied with will not dispense with such allegation.

Also a decision of Mr. District Judge Longyear, rendered January last, holding that notaries public are officers before whom affidavits may be taken and bills and answers verified within the meaning of existing laws; and that affidavits entitled as in a cause pending, when no such cause was in existence, cannot be read unless the entitling be rejected, which, if it render the affidavits meaningless in material particulars, will not be allowed.

The Legal Intelligencer, for September 11, publishes a number of interesting decisions of the Supreme Court of Pennsylvania.

In Columbia Ins. Co. v. Masonheimer, the court say that the secretary of an insurance company is the organ of communication with the policy holders, and has authority to inform a holder of the cancellation of his policy. On such cancellation there can be no recovery of the assessment on premium rate. The language of the secretary in this case is construed to be a notification of cancellation.

In Warfel v. Frantz, it is ruled that if a surety signs and delivers his bond on the express condition that his co-sureties should sign it, unless such condition is complied with, it cannot be enforced. Express assent to such condition by the obligee is not necessary.

The following is the syllabus of Bucher v. The Dillsburg & Mechanicsville R. R. Co.:

A subscription to stock of a proposed railroad, made upon a blank sheet of paper, which, it was stipulated, should not be binding or attached to the

"heading" (which contained the terms of the association) until the subscriber had inspected and approved the instrument, is not binding until that assent.

Semble, that there can be no valid subscription to the stock of the company incorporated under the act of April 4th, 1868, without the payment of ten per cent. by each subscriber.

And the following that of Hickman v. Blackmire:

As a general rule, "dying without issue" means an indefinite failure of issue, and such a limitation would create an estate tail. But such construction is controlled by the manifest intent of the testator, otherwise gathered from the whole will.

In this case it was held that the phrase referred to a definite failure of issue, and that by the limitation the devisee took the defeasible estate, which terminated at his death.

In French v. Schooner Victoria, The Hazel Dell and Victoria—two sailing vessels close hauled, and having the wind on different sides—were beating up a narrow inlet against a head wind, when a collision took place. *Held:*

1. That by the 12th and 17th Articles of the Rules and Regulations for preventing Collisions, (13 Stat. 58,) it was the duty of the Hazel Dell—the wind on her port side and being the overtaken vessel—to give way and to keep out of the way of the Victoria.

2. That whilst by the 18th Article the Victoria, under ordinary circumstances, was entitled to hold her course, she was bound by the 19th Article, from the special circumstances of the particular case, to depart from the rule in order to avoid the immediate danger.

3. That the evidence brought the case within the principles of The Maria Martin, (12 Wall. 31,) and the damages caused by the collision should be devided equally between the libellant and respondent.

The Intelligencer also republishes from this journal, Hamlin v. Pettibone (*ante*, p. 404.

The Pacific Law Reporter, for February 15, publishes Minturn v. Smith, U. S. District Court for California, Sawyer, Circuit Judge,—subject, tax deed, injunction, cloud upon title.

Also the decision of the Supreme Court of California in *re* Ah Fook, *et al.*, being a party of lewd and debauched Chinese women brought over on the steamer Japan. The court hold that the "Burlingame Treaty" does not prevent the state legislature from prohibiting the landing in the state of persons deemed and designated under the law as objectionable for reasons personal in themselves and not dependent on nationality; and that the legislature has the power to authorize the commissioner of immigration to determine whether particular individuals come within the prohibitions of the state law.

The Pacific Law Reporter, for September 8, reports the case of the St. Helens Mill Co., U. S. District Court for Oregon, in which Mr. District Judge Deady, rules the following points:

A corporation cannot execute a deed otherwise than under its seal.

A lien by way of mortgage can on only be created by a deed under seal.

An assignee represents the rights of the creditors and each of them, as well as the bankrupt, and may therefore maintain or defend proceedings in regard to the property of the latter, which on grounds of public policy or otherwise, he would not be allowed to.

A corporation cannot make a deed unless the directors, or a majority of them, meet together as a board, and so determine; and the only evidence of such meeting and action is the "record" required to be kept by the secretary.

A stockholder's meeting has no authority to elect a president and secretary of the corporation.

Meeting of stockholders without notice is invalid.

It also publishes without a syllabus the case of The San Francisco & North Pacific R. R. Co. v. Bee, under the following heading: "Corporation—Conveyance—Levy—Consideration—Breach of Statute."

Its other cases are of local importance only, and have no syllabus.

The Chicago Legal News closes its sixth volume with its number for September 19, and furnishes an index and table of cases.

It publishes an opinion of the United States Circuit Court for the Northern District of Illinois, Drummond, J., in Wheeler v. Bates, holding that since the passage of the statute of February 16th, 1874, the United States Circuit Courts in Illinois have, in proper cases, jurisdiction of actions of forcible entry and detainer; that such action is a "suit of civil nature" within the meaning of the act of Congress of 1789.

Opinion of the United States District Court for the Northern District of Illinois, Blodgett, J., in *re* McDowell *et al.*, construing the recent amendment to the bankrupt law, and holding, as a general rule, that when a debtor has had a meeting of his creditors, duly called and held, and has had his proposition for a settlement duly considered and passed upon, he should abide by the decision then had, and not be permitted to annoy creditors by requiring their attendance at further meetings. In the case before the court the object of the meeting failed, by reason of the failure to properly instruct the attorneys who represented the dissenting creditors, and another meeting was directed to be called for the purpose of again considering and acting upon the debtor's offer for a composition. The editor ot the Legal News says: "We do not remember to have seen any decision upon the point involved in this case. It is undoubtedly the first under the new provision of the bankrupt law."

Also an opinion of the United States District Court for the District of Oregon, by Deady, J., in *re* Comstock, holding that the provision of the act of June 22, 1874, amendatory of the bankrupt act, requiring one-fourth in number and one-third in amount of the creditors to join in a petition for an adjudication in bankruptcy, in cases commenced prior to its passage and since December 1, 1873, does not apply to any such cases in which there had been an adjudication prior to the date of the act; that a petition in bankruptcy is a suit, and an adjudication of bankruptcy thereon is a final judgment, which is beyond the power of Congress to set aside. We suppose this point may now be regarded as settled. See *re* Raffauf, 10 N. B. R., 69; 6 Chicago Legal News, 341; *re* Angell, 6 Chicago Legal News, 341; *re* Rosenthal, 1 Cent. L. J., 364; 6 Chicago Legal News, 342; *re* Pickering, 1 Cent. L. J., 372; *re* Obear, and *re* Thomas, id. 362.

The Legal News also publishes the decision (in full) of Mr. District Judge Blatchford, in *re* Franke. See *ante* p. 448.

Also an opinion of the Supreme Court of Illinois by McAllister, J., in Badgly v. Votrain, holding, under the written assignment recited in the opinion, where a grandfather assigned to one of his grandchildren certain notes and mortgages, but never delivered them, and was to collect and have the interest thereon during his life, and they were to be delivered at his death to the grandchild, and if the grandchild died first they were to be retained by the grandfather, that said assignment was in its nature testamentary, and that after the death of the grandfather intestate, a court of equity had no power to decree that his administrator should deliver up the notes and mortgages to the grandchild, or the one-third of the estate, which was also, by the terms of the instrument, to be given to the same grandchild. "This opinion," says the editor of the Legal News, "is of unusual interest. It would seem, however, to be but carrying out the provisions of our statute, which requires wills to be executed in the presence of two witnesses, etc. There certainly is good reason for requiring instruments, in their nature testamentary, which are not calculated to dispose of the property of the donor until his death, to be executed in accordance with the provisions of the statute of wills."

[Want of space obliges us to defer noticing some of our exchanges already received, until next week.]

Legal News and Notes.

—GOVERNOR COKE, of Texas, was formerly a judge of the supreme court of that state,

—JUDGE PECK, of the Supreme Court of Vermont, has been elected governor of that state.

—IT is said that Hon. Judah P. Benjamin's law practice in London brings him $40,000 a year.

—CHIEF JUSTICE CHURCH, of the Court of Appeals of New York, declined to run for governor of that state.

—SENATOR MERRIMON, of North Carolina, was formerly a judge of the superior court of that state. He resigned in 1867.

—HON. ISAAC F. REDFIELD, has been appointed a member of the board of trustees of the University of Modern Languages, at Newburyport, Mass.

—HON. JOSEPH D. BEDLE, one of the associate justices of the Supreme Court of New Jersey, has been nominated by the democrats for governor of that state.

—MR. BIGELOW'S forthcoming work on the law of Torts will probably be issued during the coming winter. It will be a complete work of the kind, and will have a large sale.

—HON. O. M. ROBERTS, Chief justice of Texas, has been a resident of Eastern Texas for 33 years, and like Mr. Justice NAPTON of Missouri, is now holding a place on the supreme bench of his state for the third time.

—WE notice, by strictures made in some of our exchanges, that the Forum, a quarterly legal review, published in Baltimore, Md., has not been careful in giving due credit to its various sources of information on law decisions. This is a serious charge against one so dependent upon other publications for his matter, for the Forum is emphatically an *olla podrida* of legal decisions, gathered from various sources. We hope our brother will more strictly observe the courtesies of journalism.—[*Daily Register.*

—IT is stated that a number of Wisconsin grain shippers have kept all bills paid for freight since the Potter law went into effect, and now that the supreme court has affirmed the constitutionality of the act, they will proceed to sue the companies for the difference between the lawful rates and those paid, and also for penalties.

—NEW HAMPSHIRE COURTS.—The following are the names and ages of the judges of the Superior Court of Judicature, and the Circuit Court of New Hampshire, as at present consituted :

Superior court of judicature : Edmund L. Cushing, C J., age 67 ; William S. Ladd, age 44 : Isaac W. Smith, age 49.

Circuit court : William L. Foster, C. J., age 51 ; Edward D. Rand, age 53 ; Clinton W. Stanley, age 43.

—THE Supreme Court of California, in a *habeas corpus* case of twenty-three Chinese women, brought to San Francisco per steamer Japan, has decided that the state law, which regulates such immigration, is constitutional, and remanded the women to the master of the steamer Japan to be returned to China. An attempt has been made to get the case into the federal court, on the ground that it involves the construction of a treaty between the United States and China.

—SOME time since, before the Supreme Court of Illinois, the question was argued whether an indictment charging three men jointly with striking the prosecutor with a club would support a conviction—in other words, whether three men could, at the same time, strike a fourth man with the same club. We should think such a case would be one calling for expert testimony before the jury, rather than capable of being settled upon a motion in arrest of judgment ; since the question would seem to depend entirely upon the length of the club. Mr. Attorney-General Edsall represented the club, and Professor Van Buren Denslow, of Chicago, argued the case for the clubbists. We have not learned how the question was decided.

—HON. JOHN S. KERR, a lawyer of Memphis, Tennessee, a member of the legislature of that state, fell dead at a dinner-table on the 15th instant. Col. Kerr stood well at the bar, but his extremely active and restless temperment, unfitted him for the patient plodding, which is necessary to the highest success as a lawyer. He was extremely attached to his friends, and affable and courteous to all men. We doubt whether he had any enemies, except what are termed political enemies, and toward these he was generous and candid. He did not belong to that school of politicians who ostracise others on account of their opinions. He was, in short, a liberal and generous representative of the *young South*, and his death at this time, in the flower of his strength, and in midst of his usefulness, is a matter for deep regret.

—A CONVENTION of insurance commissions which has recently held a session at Detroit, passed resolutions to the effect that taking mortgages to secure subscription to stock is unlawful and adverse to the interests of the insuring public ; that taxation of aggregate receipts of insurance companies is wrong ; that the usual return of companies in their annual statement of assets should not include the company's own stock or loans on it, or stock in any other company of the same character, office furniture, supplies, money advanced agents on premiums more than three months overdue ; and recommending that laws be framed to prohibit reinsurance after six months from the time the reinsured risk was taken, except upon the written consent of the policy-holders.

—CLUSERET, whom most Americans have heard of, has had a law suit with the publishers of a Swiss journal. He had an engagement with them to write souvenirs, but they, finding that the sale of their journal was likely to be suspended in France, got frightened and refused to publish his articles. He sued them for 162f. for copy already furnished, and 10,000f. damages for the loss of the money he might have made on copy to come. There was a contract, and the court held that the editors had fair opportunity to know what sort of literary material Cluseret would furnish ; that they had stopped him and he was ready to go on. So he was judged right in his demand, and received a verdict ; but not for 10,000f., as the court did not take him at his own valuation, but cut the damages down to 800f.

—THE LITCHFIELD LAW SCHOOL.—The first law school in the country, of any note was founded at Litchfield, Ct., by Dr. Bellamy, about twenty-five years before the revolutionary war. The law school at Litchfield owed its origin to Tappan Reeve, a native of Long Island, a graduate at Nassau Hill, a son-in-law of President Burr, and so a brother-in-law of Aaron Burr, vice-president of the United States, and was begun in 1784, just after the revolution was over. Some time afterward Judge Reeve formed a co-partnership with James Gould, a lawyer in Litchfield, and a graduate of Yale College, who became the head of the school in 1820, on the retirement of Judge Reeve, and afterward associated himself with Jabez W. Huntington, afterwards senator of the United States and judge of the Supreme Court of Connecticut. Down to 1833, about five years before the death of Judge Gould, there had been educated at Litchfield 1,024 lawyers from all parts of the United States, of whom 183 were from the Southern states. In this number are included fifteen United States senators, five cabinet officers in the general government, ten governors of states, fifty members of Congress, forty judges of the highest state courts, and two judges of the Supreme Court of the United States.—[*Springfield Union*.

—THERE appear to be some peculiarities in matters legal in the Orient, as the following extracts from some of our exchanges would seem to testify : Liu Chang-yeo, Governor of Kwangsi, denounces the acting magistrate of Ts'uan Chow for "recklessness and wanton severity." The governor had already heretofore laid down strict rules concerning the method to be pursued by district magistrates in capital cases. All persons found guilty of murder were to be sent to the high provincial authorities for sentence, and only in extreme cases was authority to be granted, on application, for execution on the spot. Notwithstanding this, the functionary complained of — who was already laboring under a charge of wrongfully releasing a prisoner on bail while in another magistracy — has actually of his own motion beheaded a prisoner, without awaiting the reply to the application he had sent up for permission to execute the sentence locally, on grounds wholly inadequate. The reason alleged for this precipitancy is that the prisoner was in so precarious a condition that, unless executed forthwith, it was doubtful whether he would live long enough to be made a public example. A rescript directs that the offending magistrate be stripped of his rank, and placed on trial to answer for his shortcomings.—[*Irish Law Times*.

Notes of Cases.

[These notes of cases are either prepared or selected with care by one of the editors.]

Railroads.—Liability of Company for Wanton and Malicious Acts of Employees.—Where the servants of a railroad company, while in the discharge of their duties, pervert the appliances of the company to wanton and malicious purposes to the injury of others, the company is liable for such injuries. Opinion by WALKER, J. C. B. & Q. R. R. Co. v. Dickson, 63 Ill, 151.

———. **Comparative Negligence—Erroneous Instruction in Regard to—Whether will Reverse.**—In an action against a railroad company to recover for injuries to the plaintiff, occasioned by alleged negligence of the defendant, the court, at the instance of the plaintiff, instructed the jury incorrectly in regard to the rule of comparative negligence : *Held*, as the evidence showed no negligence on the part of the plaintiff to compare with that of the defendant, the latter could not be heard to complain of the erroneous instruction. Ibid.

———. **Constitutional Law—Regulating Speed of Railway Trains, etc.**—By the grant of corporate franchises to railroad companies to procure the right of way and operate their trains by the power of steam, the state does not deprive itself of its inherent power to enact all police laws necessary and proper to protect the life and property of its citizens. Opinion by THORNTON, J. T. P. & W. R. W. Co. v. Duran, 63 Ill. 91.

2. By such charters, unlimited discretion in the regulation of the speed of trains is not conferred. Among the rights reserved, and which must inhere in the state, is the power to regulate the approaches to, and the crossing of, public highways, and the passage through cities and villages, where life and property are constantly in imminent danger by the rapid speed of railway trains. The exercise of corporate franchises must yield to public exigencies and the safety of the community. Ibid.

———. **Ordinance—Speed of Railway Trains.**—The corporate authorities of the town of Cuba enacted the following ordinance : "That it shall be unlawful for any railroad company, by themselves or their agents, to run at a greater speed within the corporate limits of the town of Cuba than five miles per hour ;" and provided a penalty for its violation, not less than $10 nor more than $100 : *Held*, That the corporate authorities had the power under the statute to pass the same, and that while it was somewhat informal, its meaning was plain enough to be easily understood. Ibid.

———. **Negligence—Evidence of—Burden of Proof.**—Where a railroad company runs its trains through the limits of an incorporated city or village at a greater rate of speed than is permitted by the ordinances of such city or village, if any live stock is killed by such train, the killing, by the stat ute, will be presumed to have been done through the negligence of the company ; and in an action by the owner of the stock, proof of the killing and violation of the ordinance will make out a *prima facie* case of negligence, and throw the *onus* upon the company to rebut this presumption of law. Ibid.

———. **When Liable for Injury to one Employee through the Fault of Another.**—If a servant of a railroad company be injured through the incompetency and unskillfulness of a fellow-servant, or in conse-

quence of defects in machinery or track, and the company be guilty of negligence in the employment and retention of such agent, or in the construction and repair of its machinery and track, it is liable in damages. Opinion by SCOTT, J. Chicago & Alton R. Co. v. Sullivan, Adm'x, 63 Ill. 293.

———. **Habitual Intemperance** of a conductor, under circumstances bringing knowledge thereof to his employers, is sufficient to render them liable for injury resulting therefrom. Ibid.

———. **Contributory Negligence.**—Partial or slight negligence and inattention of the party injured will not bar recovery, when palpable negligence of the employer is proven. Ibid.

———. **Action Against for Killing Employee, by what Law Governed.**—An action by a wife against a railroad company for the homicide of her husband by the negligence of its servants, in the runntng of its train, is an action depending for its existence on the law of the state where the homicide occurred, and when such homieide occurred in the state of Tennessee, the right of action is in such person or persons as is provided by the law of Tennessee. Western & Atlantic Railroad Company v. Mary Strong. Supreme Court of Georgia. Sept. 8, 1874, opinion by MCCAY, J.

———. ———. **Who Must Sue.**—When the right of action for the homicide of a husband and father, is given by law to the personal representative, for the use of the wife and children, the wife cannot sue alone and in her own name. Ibid.

———. ———. **Nature of the Action.**—An action for the homicide of a husband by the running of rail cars, charged to be by reason of negligence, either in the railroad company or its servants, is an action, sounding in tort, and not an action excontractu, but in determining whether the railroad company is liable, the relation of the deceased to the railroad, whether as an employee, or passenger, or stranger, are essential elements in deciding whether the killing was wrongful. The rights of the wife or the representative to sue, depends upon the wrongfulness of the killing, and if the killing occurred under such circumstances as, by the laws of the place of the killing, or by a legal contract between the parties, the railroad company was not guilty of any breach of duty to the deceased, the right of action does not accrue. Although the language of our code, section 2971, would seem to give a wife the right to sue for homicide of her husband, in broad terms and without qualification, yet, in deciding whether a right to recover damages in any case exists, it must appear that the killing was a wrong, that is, that the defendant in such killing was guilty of a *breach of duty*, express or implied, which was due to the deceased, and if there was no such breach there can be no recovery. Ibid.

———. ———. **Right of Railroad Company to Limit its Liability by Contract.**—If a railroad employee contract with his employer that he will assume all the risks of his employment, and will not hold the company liable for the negligence of its servants, and he be killed under such circumstances as, under his contract, and under the law, he could not, had he lived, have recovered damages for an injury received, then his wife cannot recover damages for his death. The basis of the right of action in both cases is a breach of duty implied by law or assumed by contract, and if there be no such breach by the defendant, the wife cannot recover. Ibid.

NOTE.—The contract in the foregoing case between the railroad company appears to have been executed upon the following blank:

Office of the Western & Atlantic Railroad Company, ———— 187.—

This agreement witnesseth, that ———— has, at his own request, this day been employed on said railroad; and it is hereby understood between the parties and expressly agreed that the said ———— in consideration that the said Western & Atlantic Railway Company will hire and pay him the wages stipulated, which is more than he can get elsewhere; will take upon himself all risk connected with or incident to his position on the road; and will, in no case, hold the company liable for any injury or damage he may sustain, while so employed, in his person or otherwise, by what are called accidents or collisions on the trains or road, or which may result from the negligence, carelessness, or misconduct of himself or any other employee or person connected with said road, or in the service of said company, *or from any other cause.*

And it is further agreed, that the company is to pay the said ———— for no time lost from its service by accident, disability, or otherwise, but is to pay at the rate which may from time to time be agreed upon, only for the services actually rendered by the said ———— and the company reserves the right to discharge him, whenever they are not satisfied to retain him. And the said ———— expressly waives and relinquishes any and all legal rights he may have, that are in conflict with this contract, and assumes all risk.

In witness whereof, the said ———— and said company, by Joseph E. Brown, its president, have hereunto set thesr hands and seals

———— [SEAL]

———— [SEAL]

PRESIDENT W. & A. R. R. COMPANY.

We have not seen the full opinion in the case of which we give an abstract above; but we are clearly of the conviction that the clause in the above blank form of contract which we have italicised, is contrary to public policy, and one which no court of justice ought to enforce. The correct principle, in our judgment, is that the state is interested in preserving the lives of its citizens; and hence will not permit a railroad company, or any other person or corporation, to stipulate against civil responsibility for homicides committed through its own negligence. This view becomes still more clear, and strikes the mind with more force, when it is considered that the state punishes such negligent homicides *as felonies*. We doubt whether any part of such a contract, which stipulates against liability for the consequences of the negligence of the railroad company, ought to be sustained. See an able discussion on this question by Mr. Justice BERRY of the Supreme Court of Minnesota, in Jacobus v. St. Paul, etc. Ry. Co., *ante*, p. 375.

If considerations of public policy will supervene to prevent a common carrier from stipulating against the consequences of his own negligence, in respect to the care of inanimate merchandise, may not such considerations be much more strongly urged where a master endeavors, by contract, to stipulate against responsibility for the negligent killing or injuring of his servant? In those exceptional cases where a recovery is permited against a master by a servant, for an injury caused by a fellow-servant, it is upon the theory that the master, as well as the servant, has been negligent—that is, that the master has been negligent in selecting an unskilful servant. So far, therefore, as the above contract seeks to change any existing rule of law, it seems clear that it is against public policy and void. The idea that the state will permit one of its citizens, for an increase of wages, to contract away his life or personal safety by a stipulation with another citizen, which, in effect, says, "if you injure me or kill me through your negligence, neither I, in the one case, nor my personal representative in the other, will hold you responsible"—is monstrous.

Besides, to sustain such contracts as valid, cannot fail to have a tendency to diminish the care exercised by the railway company in the selection of its servants; nor can it fail to increase the number of reckless and irresponsible servants in the employ of the company; and in both of these ways *the danger to the traveling public is increased*—another reason why such contracts conflict with public policy. Indeed, to sustain such contracts seems as impolitic as a rule of law would be which would require the persons on board a ship in distress to throw over the sailors in order to save the passengers; for as respects the sailors, "unless these abide in the ship, all will perish."

Statute of Frauds—Sale by Auction—Memorandum in Writing—Entry in Sales book by Auctioneer's Clerk.—The plaintiff sent a mare to be sold by auction at the defendant's repository. The defendant advertised the mare for sale by auction on the 28th of March, 1872, and circulated a printed catalogue of the horses to be sold at his sale, with conditions of sale annexed, in which the plaintiff's mare was described as lot 49. The defendant had a sales-ledger, which was headed "Sales by Auction, 28th March, 1872," in which the plaintiff's mare was also numbered 49; but neither the catalogue nor the conditions of the sale were annexed to the sales, ledger, nor were they referred to therein. On the 28th of March, 1872, the lots described in the catalogue were put up by the defendant for sale under the conditions. The plaintiff's mare was put up for sale and knocked down to M. for £33, and thereupon the defendant's clerk wrote in the columns of the sales-ledger, left blank for this purpose, the name of M. as purchaser, and the price. M. afterward refused to take the mare:—*Held*, that the catalogue and the conditions of sale were not suffieiently connected with the entries in the sales-ledger to make a note or memorandum in writing of a contract by M. to satisfy section 17 of the statute of frauds. *Semble*, that the entry by the clerk was not by an authorized agent so as to bind the purchaser. Pierce v. Corf, L. R., 9 Q. B. 210.

Master and Servant—Service for "Twelve Months Certain"—Notice—Continuance of Service beyond the Twelve Months.—The defendant agreed to serve the plaintiff as a traveler and agent "for twelve months certain," after which time either party should be at liberty to terminate the agreement by giving the other a three-month's notice. *Held*, (by Bramwell and Pigot, BB., Kelly, C. B., dissenting), that at the close of the twelve months the agreement could be determined by either party without any notice, and that the stipulation as to a three-mouths notice only applied in case the engagement was prolonged beyond the twelve months. Langton v. Carleton, L. R., 9 Ex. 57.

Right of Creditors to Oppose Bankrupt's Discharge.—A creditor has no absolute right to appear and oppose the discharge of a bankrupt after the return day of the order to show cause, though the proceedings may have been adjourned for other purposes. But the court may permit opposition to be made at any time before the discharge is granted, and if a creditor who has duly filed specifications of opposition is about to withdraw them, other creditors may be permitted to carry on the opposition, on good cause shown. *In re* Houghton, U. S. Dist. Court, Dist. of Mass., by LOWELL, J.